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CASE NO.

IN THE
SUPREME COURT
OF THE
UNITED STATES
October Term, 1985

JERRY B. SCHREIBER,
Personal Representative
of the
ESTATE OF
THEADORES W. ROSS,
Petitioner,

vs.

CHASE FEDERAL SAVINGS
AND LOAN ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether Petitioner, the Estate of an elderly person defrauded of her property, has been deprived of real property, and due process as guaranteed in the Fifth and Fourteenth Amendments of the Constitution of the United States by the Judgment of the Supreme Court of Florida reversing a Decision of the Florida Third District Court of Appeal, sitting en banc?

II

Whether the Supreme Court of Florida improperly usurped the power of the Legislature when it removed the common law protection in the conveyance of real property?

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PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT
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FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Florida entered on August 30, 1985, in the above-entitled Cause.

OPINION BELOW

The Opinion of the Supreme Court of Florida is reported at 479 So.2d 90, and is printed as Appendix A. This is an opinion on rehearing after CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION (hereinafter known as CHASE FEDERAL), Petitioner below, filed a Motion for Rehearing which was granted. CHASE FEDERAL'S Motion for Rehearing is printed in Appendix F, infra. SCHREIBER, Respondent below, timely filed a Response to CHASE FEDERAL'S Motion for Rehearing. This Response is printed in Appendix G.

The Opinion of the Supreme Court of Florida dealt with two separate and distinct issues: (1) the proper scope of Review for en banc proceedings for intermediate appellate courts in the State of Florida, and (2) the merits of

the instant case, whether a deed given to a non-relative in return for "love and affection" is without consideration and is invalid. On Rehearing, the only issue raised by CHASE FEDERAL was the issue on the merits. The Opinion and Decision of the Supreme Court of Florida, entered on August 30, 1985, Appendix A, held that there does not need to be consideration in order for an owner of land to convey it by deed to another person.

JURISDICTION

The Judgment of the Supreme Court of Florida was entered on August 30, 1985, Rehearing denied January 2, 1986, Appendix C. Jurisdiction of this Court is invoked under Title 28, United States Code Section 1257(3), Petitioner having asserted in the Courts below rights, privileges, and immunities con-

ferred by the Constitution and Laws of the United States.

How The Federal Questions Were Presented.

The Judgment of which review is sought is the Judgment of the Supreme Court of Florida in which that Court determined the validity of a deed to real property with the stated consideration being "love and affection" between two parties who were not related by blood or marriage.

In substance, the allegations before the Supreme Court of Florida, insofar as pertinent to the Jurisdiction of this Court, were that Petitioner had been denied constitutional rights guaranteed by the Fifth and Fourteenth Amendments in that the Supreme Court of Florida, both expanded the meaning of a

1968 Amendment to the Constitution of the State of Florida, and heard, for the first time in this Cause, an issue raised by the Respondent which it had not raised in any of its prior pleadings or any proceedings below, other than on Rehearing before that Court (Appendixes E, F, and G).

How Federal Questions Were Disposed Of.

The Supreme Court of Florida denied SCHREIBER'S Motion for Rehearing on January 2, 1986 (Appendix C).

Although the Supreme Court of Florida did not expressly rule on SCHREIBER's federal constitutional rights, it nevertheless so disposed of these allegations as to confer Jurisdiction upon this Court. Actual determination by the State Court of the federal question in specific terms is not

required. Lawrence v. Mississippi, 286 U.S. 276, 282, 52 S.Ct. 556, 76 L.Ed. 1101 (1932), Dorchy v. Kansas, 272 U.S. 306, 308-309, 47 S.Ct. 86, 71 L.Ed. 248 (1926), Dewey v. DesMoines, 173 U.S. 193, 199, 19 S.Ct. 379, 43 L.Ed. 665 (1899). Moreover, the fact that a Decision purports to rest upon State grounds does not preclude this Court from deciding whether federal constitutional rights were in fact denied. Williams v. Georgia, 349 U.S. 375, 75 S.Ct. 814, (1955); Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681-682, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); Davis v. Wechsler, 263 U.S. 22; 44 S.Ct. 13, 68 L.Ed. 143 (1923); and Rogers v. Alabama, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (1904).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article X, Section 4(c) of the Florida Constitution, as revised in 1968, provides in pertinent part:

> "The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift...."

Article II, Section 3 of the Florida Constitution, as revised in 1968 states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Florida Statutes, § 2.01 (1983) states:

> The common and statute laws of England which are of a general and not a local nature, with the

> exception hereinafter mentioned, down to the 4th Day of July, 1976, are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the Legislature of this state.

STATEMENT OF THE CASE

The uncontroverted facts reflect that Peter Cournoyer, a roofer, induced Theadores W. Ross, a lady 90 years of age, to transfer title in her home to him by a Quit Claim Deed, which stated that "[T]his Quit Claim Deed is being given with the consideration being 'love and affection'". The deed was recorded with a minimum amount of documentary stamps affixed. Cournoyer then sold the property to Luis and Gladys Perez for $50,000.00. The Perezes obtained the major portion of the purchase price from the mortgage proceeds supplied by CHASE

FEDERAL SAVINGS AND LOAN ASSOCIATION. The Perezes proceeded to close the transaction without a lawyer, asserting that they were relying on CHASE FEDERAL and its lawyers in closing the transaction.

After Cournoyer sold the property to the Perezes, Ross sought to cancel her deed to Cournoyer, Cournoyer's deed to the Perezes, and the Perezes mortgage to CHASE FEDERAL, on the ground that the original deed to Cournoyer was void for lack of consideration (Appendix D). The Trial Court found "There was no consideration for the execution of...[The Deed to Cournoyer] with the exception of love and affection and therefore equitable title and interest in the subject property remained in Ross". The Trial Court concluded, however, that "legal title did pass" from Cournoyer to

the Perezes because the Perezes were "bona fide purchasers having paid a valuable consideration without notice of any infirmity, and, therefore, their title to the subject property and interest in the subject property respectively shall stand." Finally, the Trial Court, holding that a Constructive Trust arose for the benefit of Ross in the proceeds of the sale received by Cournoyer in the sale to the Perezes, entered a Judgment for Ross against Cournoyer in the amount of $50,000.00.

Ross appealed the Trial Court's denial of her claim for cancellation of the deeds and mortgage, asserting that the Perezes, as purchasers, and CHASE FEDERAL, as mortgagee-holder, did not have valid interest in the property because there was notice on the face of

the deed to Cournoyer that the consideration was legally insufficient. Therefore, Ross contended, the Perezes were not bona fide purchasers for value without notice and CHASE FEDERAL could not claim a valid mortgage on the property. In a Rehearing en banc before the District Court of Appeal, Third District Florida, a majority of the en banc Court considering the Cause on the merits, reversed the Trial Court, reported at 422 So.2d 911 (Fla. 3d DCA 1982), holding that under the District Court's prior decision in Florida National Bank and Trust Co. v. Havris, 366 So.2d 491 (Fla. 3d DCA 1979) a deed given to a non-relative in return for love and affection is invalid for lack of consideration. In so holding, the District Court found that the Perezes and CHASE FEDERAL were on

notice to make inquiry concerning the propriety of Ross's deed to Cournoyer since the only consideration reflected was "love and affection". The District Court then remanded the cause with directions to cancel the deed to Cournoyer and the Perezes, and the mortgage to CHASE FEDERAL.

CHASE FEDERAL, the mortgagee, timely appealed this Decision to the Supreme Court of Florida. The Perezes filed an untimely appeal and their appeal was dismissed for lack of jurisdiction, Rehearing denied as reported in 443 So. 2d 980 (Fla. 1983). The Perezes, never parties below, attempted to intervene in this Cause and as recently as March 6, 1986, the Supreme Court of Florida denied their attempt to intervene (Appendix I).

The unofficial Opinion and Decision of the Supreme Court of Florida

rendered on July 26, 1984 and withdrawn on August 30, 1985, by the Court (Appendix B cited at 9 FLW 313 (Fla. July 26, 1984) stated in part, that "A deed given to a non-relative in return for 'love and affection' is without consideration and is invalid".

CHASE FEDERAL filed its Motion for Rehearing (Appendix F). SCHREIBER, in his timely response (Appendix G) specifically and timely pointed out to the Court that CHASE FEDERAL'S only viable issue on Rehearing had <u>never</u> been raised in any of the prior proceedings (See Appendix A, the dissent of Mr. Justice Overton, and Appendexes G and E), and in accordance with precedent from the Supreme Court of Florida, this issue on Rehearing should <u>not</u> be considered by the Court (Appendix G).

However, on August 30, 1985, the Supreme Court of Florida reversed itself and held that because of Article X, Section 4(c) of the 1968 Revision to the Florida Constitution, no consideration is required for the conveyance of real property (Appendix A). In his Motion for Rehearing, SCHREIBER (Appendix H) specifically raised the following points:

(1) That the majority of the Court, through its Decision, was legislating new law contrary to the doctrine of separation of powers and its own authority under the Florida Constitution; and

(2) That the Court's interpretation of Article X, Section 4(c), is contrary to the intent of the framers of this Amendment; and

(3) That the Court, by deciding the merits of this Cause, on an issue never presented nor addressed by the Trial Court, the District Court of Appeal, or the Supreme Court of Florida in the First Appeal is violating SCHREIBER'S entitlement to procedural due process as guaranteed by the Fifth and the Fourteenth Amendments. Furthermore, the action of the Court in considering a new issue raised for the first time on Rehearing in the Florida Supreme Court directly and expressly conflicted with each and every other prior decision of the Florida Supreme Court on the entitlement to raise a new issue for the first time on appeal. On January 2, 1986 (Appendix C) SCHREIBER'S Motion for Rehearing was denied.

Whereupon, Petitioner brings the Cause here, seeking a review by this

Court of the Judgment and Decision of the Supreme Court of Florida.

REASONS FOR ALLOWANCE OF THE WRIT

I

THE PETITIONER, THE ESTATE OF AN ELDERLY PERSON DEFRAUDED OF HER PROPERTY, HAS BEEN DEPRIVED OF REAL PROPERTY, AND DUE PROCESS AS GUARANTEED IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES BY THE JUDGMENT OF THE SUPREME COURT OF FLORIDA REVERSING A DECISION OF THE FLORIDA DISTRICT COURT OF APPEAL, SITTING EN BANC.

As earlier discussed, under Jurisdiction, while although the Opinion and Decision of the Supreme Court of Florida is based upon a non-federal ground, federal constitutional rights may be denied as much by refusal of the Court to decide questions as by its erroneous decision. Lawrence v. Mississippi, supra. Furthermore, this

Court will neither condone or tolerate denial of due process of the law. As stated by Mr. Justice Brandeis in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, supra at 682:

> While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

The basis of the ruling below was the Court's considersation of a new issue raised for the first time on Rehearing by CHASE FEDERAL, even though for nearly eighty years, the established practice and policy of the appellate courts in Florida was to confine the parties to issues raised in the pleadings

and in the trial court and not to permit new issues to be raised for the first time on appeal. Where a state court has frequently dealt with particular issues under a specific procedure, this Court has held that a subsequent refusal to consider those issues under that procedure will not bar review by this Court. Williams v. Georgia, supra. This Case presented here is in the same posture.

As early as 1909 in Hartford Fire Ins. Co. v. Hollis, 50 So. 985, 989, 58 Fla. 268 (1909), the Florida Supreme Court stated:

> ...It is the declared policy of this Court to confine the parties litigant to the points raised and determined in the court below, and not to permit the presentation of points, grounds, or objections for the first time in this Court...

In Jones v. Neibergall, 47 So. 2d 605 (Fla. 1950) at 606, the Supreme Court of Florida again stated:

> It is quite true that reasonable inferences from the evidence may be said to point to...equities, but not having been presented or ruled on by the trial court, it would be utter folly to urge their adjudication by this Court at this time. We will not devine issues from the ether nor attempt to adjudicate those not presented by the pleadings or ruled on by the trial court. (Emphasis added).

Eight years later the Court below stated in South Dade Farms, Inc. v. Peters, 107 So. 2d 30 (Fla. 1958) at 32:

> It is well established that this Court will not undertake to pass on questions until after the trial Judge hasd had an opportunity to consider same. City of Lake Worth v. First National Bank in Palm Beach, Fla. 1957, 93 So. 2d 49; Mariani v. Schleman, Fla. 1957, 94 So. 2d 829; Lee County Oil Company v. Marshall, Fla. 1957, 98 So. 2d 510.

And again, in 1962, that Court stated in Lite v. City of Miami, 141 So. 2d 738 (Fla. 1962) at 743:

> The record is devoid of a single fact which would indicate that this question was ever before the

> trial court. It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by this Court on appeal. Mariane v. Schleman Fla. 94 So. 2d 829; Jones v. Neibergall, Fla. 47 So. 2d 605. (Emphasis added).

As stated in In re: Beverly, 342 So. 2d 481 (Fla. 1977) at 489, a case in which the Supreme Court of Florida considered the constitutionality of a statute authorizing involuntary civil commitment of mentally-ill persons, the Court stated:

> ...[T]his Court should decline the review of questions which the trial court did not have a full and adequate opportunity to consider. Silver v. State, 188 So. 2d 300 (Fla. 1966); Reinhard v. Bliss, 85 So. 2d 131 (Fla. 1966).

In Silver v. State, 188 So. 2d 300 (Fla. 1966) in discussing a constitutional

issue that was raised for the first time on appeal but not before the trial court, the Court below stated:

> "...It is an attempt to circumvent the trial court despite the former ruling that an appellate court will disregard questions not presented to trial court. Ross v. Florida Sun Life Insurance Co., Fla. App., 124 So. 2d 892; Northeast Polk County Hospital District et al v. Snively, Fla. 162 So. 2d 657. In the Opinion in Mariani v. Schleman, Fla., 94 So. 2d 819 this Court said that it was "A rule of long standing that on appeal this Court [would] confine itself to a review of those questions and only those questions, which were before the trial court. Furthermore, the Court said 'matters not presented to the trial court by the pleadings and evidence will not be considered by this Court on appeal'". (Emphasis added).

And as recently as 1981, in Dover v. Worrell, 401 So. 2d 132 (Fla. 1981) at 1323, 1324 the Court said:

> In other areas of the law we have previously held it inappropriate to raise an issue for the first time on appeal. For example, an appellate court will not consider issues not presented to the trial judge either on appeal from an order of dismissal, Lite v. City of Miami, 141 So. 2d 783 (FLA. 1962) or on appeal from final judgment on the merits, Cowart v. City of West Palm Beach, 255 So. 2d 673 (Fla. 1971); Mariani v. Schleman, 94 So. 2d 829 (Fla. 1957); Jones v. Neibergall, 47 So. 2d 605 (Fla. 1950). We now add to this list and hold it inappropriate for a party to raise an issue for the first time on appeal from a summary judgment.

Regardless of these prior decisions, the Florida Supreme Court in this Decision appealed from totally disregarded its holdings when it stated in its Opinion, Appendix A:

> To the extent, however, there is doubt in the law of Florida as to the requirement of consideration when ownership of land is transferred, we find it conclusively resolved against such a requirement by the state constitutional law of homestead.

With that introduction, the Opinion appealed from goes on to discuss Article X, Section 4(c) of the 1968 Revision to the Florida Constitution as justification for its Decision in this Cause. [Although Mrs. Ross, the 90-year old grantor resided on the property, which is the subject matter of this action, she resided there alone. Under Florida Law, Florida Statute Chapter 222 (1983), and Constitution of the State of Florida, Article X, Section 4, the subject property would not qualify as homestead as Mrs. Ross purchased this property in her own name and was residing there alone when she was defrauded in 1977. Having no family living with her at the time, she cannot be deemed to be "the head of the family" residing on the subject property, as Florida homestead requires.

Therefore, this subject property did not meet the Florida qualification as "homestead property".]

With the foregoing in mind, the Supreme Court of Florida rationals (Appendix A) that:

> "Because the constitutional law of homestead protection has been changed to eliminate the requirement of a valuable consideration as a condition of any conveyance of homestead property, we conclude there should be no such limitation on the right to alienate by gift real property in general. If a homestead, which is the policy of the law to protect and preserve in the family, may be conveyed away by deed of gift, we see no reason why the same rule should not apply to all property. We, therefore, hold that there does not need to be consideration in order for an owner of land to convey it by deed to another person."

As can be readily seen from Appendix E, CHASE FEDERAL'S Answer in this Action; Appendix F, CHASE FEDERAL'S Motion for Rehearing from the unofficial

Decision (Appendix B) filed August 9, 1984; Appendix G, SCHREIBER'S response to CHASE FEDERAL'S Motion for Rehearing and Clarification filed August 20, 1984; and Appendix H, SCHREIBER'S Motion for Rehearing from the Decision appealed from and filed September 24, 1985, CHASE FEDERAL never raised the subject constitutional issue in this action before it filed its Motion for Rehearing and Clarification in 1984. As specifically stated in Appendix G before the Supreme Court of Florida:

> In this cause, Petitioner NEVER raised this constitutional issue in either the trial court, nor in the initial appeal in the Third District Court of Appeal, nor in the en banc proceedings held in the Third District Court of Appeal.
>
> This issue was not raised by the Petitioner in the appeal in this cause until the filing of this Motion for Rehearing.

> Furthermore, a review of "Other Authorities" cited by Petitioner in both its initial and reply Briefs discloses that no reference to Article X, §4(c), Fla. Const. was ever made.

On two occasions Mr. Justice Harlan wrote in NAACP v. Alabama, 357 U.S. 449, at 457-58, 78 S.Ct. 1163, at 1169; and in NAACP v. Alabama, 377 U.S. 288, 301, 84 S.Ct. 1302, 1311 that:

> Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. 357 U.S., at 457-458, 78 S.Ct., at 1169.

If, as here, a decision of a state supreme court can wipe out nearly eighty years of case law with the stroke of a pen, ignoring fundamental appellate practice, then most assuredly the litigant may in fact be deprived of the right

of appeal. Clearly, the opportunity to appeal an erroneous judgment is an essential element of the due process guaranteed in the Fourteenth Amendment of the Constitution of the United States.

II

THE FLORIDA SUPREME COURT IMPROPERLY USURPED THE POWER OF THE LEGISLATURE WHEN IT REMOVED THE COMMON LAW PROTECTION IN THE CONVEYANCE OF REAL PROPERTY

Article II, Section 3 of the Florida Constitution, as revised in 1968 states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Is is axiomatic that under the mandates of constitutional law, the

Constitution of the State of Florida is not a grant of power, but rather a limitation of power. Furthermore, the Court below specifically stated in, In Re Apportionment Law, Senate Joint Res. No. 1305, 263 So. 2d 797 (Fla. 1972) at 806:

> This Court in accordance with the doctrine of separation of powers, will not seek to substitute its judgment for that of another coordinate branch of government, but will only measure the acts done within the aspect of the Constitution.

In the Opinion below the Supreme Court of Florida has now expanded the constitutional meaning of a portion of the Florida Constitution relating solely to homestead property and has interpreted it to mean that "For the conveyance of real property with no monetary consideration, there is no longer the

common law requirement that the grantee be related to the grantor by blood or marital affinity".

The rationale for this determination, as stated in the Opinion below, Appendix A, is that:

> ...[I]f a homestead, which it is the policy of the law to protect and preserve in the family, may be conveyed away by deed of gift, we see no reason why the same rule should not apply to all property. (Emphasis added).

Expanding the constitutional meaning of the 1968 Revision to the Florida Constitution, Article X, Section 4(c), to include all property, virtually overruled 450 years of common law as well as Section 2.01 Florida Statutes (1983) which states:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th Day of July, 1976,

> are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the Legislature of this state.

The application of this Statute has been interpreted by Florida courts in Choctawatchee Elec. Coop., Inc. v. Major Realty Co., 161 So. 2d 837, 839 (Fla. 1st DCA 1964) where the court said:

> "Common law principles continue to prevail in Florida unless modified by statute."

Surely, then, based on the foregoing, the common law of doctrine requiring blood or marital affinity between a grantor and grantee of real property, for no monetary consideration, had been adopted by the State of Florida with the force and effect of a statute. The Decision below has now, in effect, repealed this body of law contrary to the Constitution of the State of Florida.

If the judiciary finds the meaning of a statute or a section of a constitution ambiguous or unclear, the normal procedure is to determine the legislative intent. This Court has continually relied on Congressional history. Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d, 491 (1969); Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) and Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817 (1922). Had this been done concerning Article X, Section 4(c) of the Florida Constitution, as Revised in 1968, it would have become imminently clear that the Decision of the Supreme Court of Florida was totally different from the legislative intent. From the inception of this Amendment, the intent of this

revision was as stated by the Author of the Amendment in the transcript of the Preliminary Proceedings 1966-67 Florida Constitution 1968, page 258, et seq., (Appendix J) wherein former Supreme Court Justice, Mr. B. K. Roberts, said:

> ...[T]hat where a man and his wife had purchased and worked out a home, and for reasons of their own they see fit to leave it to one of a number of children, they should have a right to do so.

At page 260 of the transcript, the question of "consideration for a deed" arose, and Mr. Justice Roberts responded:

> I incline to the view that if a conveyance is made without consideration, that it would not be valid. (Emphasis added).

The intent of the framer of this revised section of the Florida Constitution was that the owner of

homestead and his wife could make a gift of their homestead property to "one of [their] children". Of course, the consideration reflected for the conveyance on the Deed would therefore be "good consideration" defined as:

> "Consideration based upon a natural duty which exists between relatives by blood or marriage." Words and phrases, Good Consideration (1972).

The clear intent of the framer of this Amendment was to maintain the "gift" within the family unit and not to expand its meaning as was done in the Opinion below. Furthermore, the 1968 Amendment to this Section of the 1885 Constitution of the State of Florida was explained to the voters of the State of Florida in the Official Analysis of the Proposed Constitution submitted by the

Legislature to the voters for radification at the November 5, 1968 General Election. This Official Analysis explained the change to the provision in issue as follows:

> ...The right of a married owner to directly transfer by deed, title of the homestead to himself and his spouse as an estate by the entirety should be given constitutional status. Also, the Legislature would be directed to provide a method of alienating or encumbering homestead property where either the owner or spouse is incompetent. (Emphasis added).

Draft of the proposed 1968 Constitution, Article X, Section 4 analysis of the Proposed Revision (July 20, 1968). See Appendix C, the dissent of Mr. Justice Overton.

In his dissenting opinion, Mr. Justice Overton goes on to demonstrate that he recognized the disparagement bet-

ween what the Electorate voted on and the impact of the wording of this Section of the Constitution as interpreted by the Decision below. It does not follow that the Decision below accurately reflects either the intent of the framers of this constitutional amendment or the offical interpretation offered to the voters of the State of Florida, who approved this amendment in 1968.

That the legislative and not the judicial branch of government is charged with the responsibility of creating new law has also been clearly recognized by this Court in National Broiler Marketing Assn. v. United States, 436 U.S. 816, 827, 98 S. Ct. 2122, 2130, 56 L.Ed.2d 728 (1978), in which this Court stated:

> ...but, as the second Mr. Justice Harlan said, when speaking for the Court in another context, a statute 'is not an empty vessel into which this Court is free to

> pour a vintage that we think better suits present day tastes'. United States v. Sisson, 399 U.S. 267, 297, 90 S.Ct. 2117, 2133 26 L.Ed.2d 608 (1970).
> Considerations of this kind are for the Congress and not the courts.

So too, the Florida Supreme Court is not permitted to intrude upon the domain of the Legislature and pour a new vintage into the vessel of an amendment of the State Constitution. See Article II, Section 3, Florida Const. (1983). But in this cause,when the Decision appealed from said, "[W]e see no reason why the same rule (as homestead) should not apply to all property", it has done just that. This is contrary to its prior decisions, contrary to its own State Constitution, contrary to the intent of this Amendment's author, contrary to the voice of the Electorate of Florida, and

contrary to the doctrine of the separation of powers.

This case is of vast public importance, for it concerns a growing problem common to all jurisdictions; i.e., fraud on the elderly. Not only does it impact upon the rights of the elderly, who when living alone are more susceptible to being defrauded of their property, but also, it impacts upon the viability of common law protections in the conveyance of real property in today's society.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectively submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Petition for Writ of Certiorari and notice that Appendix to follow were mailed, postage prepaid, pursuant to Supreme Court Rules 28.3 and 28.4 to Therrell, Baisden, Stanton, Wood and Seitlin, 1111 Lincoln Road, Suite 600, Miami Beach, Florida 33139 and Frank Gramling, Esq., 750 S.E. 3rd Avenue, Suite 200, Ft. Lauderdale, Florida 33316, the 2nd day of April, 1986.

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By _____
Jerry B. Schreiber, Esq.

STATE OF FLORIDA)
)ss
COUNTY OF DADE)

Personally before the undersigned authority appeared Jerry B. Schreiber who, under oath and from his own personal knowledge, states that the foregoing Certificate of Service is true and correct. Dated 4/7/86

NOTARY PUBLIC, State of Florida, at Large.

My Commission Expires: 4/25/89

APPENDIX

The prepared Appendix for this Petition will be served as soon as the typing is complete. On the following page the reader will find the subject matter listing of the Appendix.

APPENDIX LISTING

Subject	Appendix
Opinion and Decision of the Supreme Court of Florida, dated August 30, 1985	A
Unofficial Opinion and Decision of the Supreme Court of Florida, dated July 26, 1984.	B
Order on Rehearing, dated January 2, 1986	C
Complaint of Petitioner . . .	D
Answer of Respondent	E
Respondent's Motion for Rehearing, filed in the Supreme Court of Florida on August 9, 1984	F
Petitioner's Response to Respondent's Motion for Rehearing, filed in the Florida Supreme Court on August 20, 1984	G
Petitioner's Motion for Rehearing, filed in the Florida Supreme Court on September 24, 1985	H

Appendix Listing - Continued

Subject	Appendix
Order of the Florida Supreme Court on Perezes' Motion to Intervene, dated March 6, 1986	I
Excerpt of Transcript of Preliminary Proceedings 1966-67, Florida Constitution, 1968	J